

SIXTH DIVISION
December 27, 2013

No. 1-13-0502

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTOPHER REED, Individually and as)	Appeal from the Circuit Court
Administrator of the Estate of AMBER REED, JASON)	of Cook County
CLARK, LACEY FREDERICKS, HARVEY KIMBLE,)	
Personal Representative for the Estates of ALVIN)	
KIMBLE and GAIL KIMBLE, KEARA CARPENTER,)	No. 11 L 4321
and JACKIE NOVAK, Administrator for the Estate of)	
CHARLES NOVAK,)	Honorable James N. O'Hara,
)	Judge Presiding.
Plaintiffs-Appellees,)	
)	
v.)	
)	
FERRARA PAN CANDY CO., INC., GLOBE CARRIER)	
CO., ROUMEN VELKOV, and GERGANNA LAZOVA,)	
and CJH FREIGHT SERVICES, INC.,)	
)	
Defendants-Appellants.)	

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order denying defendants' motion to dismiss based on *forum non conveniens* is affirmed. The trial court did not abuse its discretion as

defendants were unable to meet their burden to strongly demonstrate North Carolina was a more convenient forum.

¶ 2 Defendants Ferrara Pan Candy Co., Inc. (Ferrara Pan), Globe Carrier Co. (Globe), Roumen Velkov (Velkov), Gergana Lazova (Lazova), and CJH Freight Services, Inc. (CJH) (collectively defendants), appeal an order entered in the circuit court of Cook County denying their motion to dismiss the wrongful death, survival, and negligence suit of plaintiffs based on interstate *forum non conveniens*. Plaintiffs sought damages for the deaths and injuries resulting from a tractor trailer accident occurring in Hamilton County, North Carolina. On appeal, defendants contend the circuit court abused its discretion because: (1) all defendants were already defending an action in North Carolina arising out of the same accident; (2) the vast majority of the occurrence witnesses and the damages witnesses reside in North Carolina or adjoining states hundreds of miles from Illinois; (3) plaintiffs' choice of an Illinois forum was entitled to little deference; and (4) the relevant public and private interest factors strongly favor trial of this case in North Carolina. For the reasons which follow, we affirm the determination of the circuit court.

¶ 3 BACKGROUND

¶ 4 In August 2012, plaintiffs Christopher Reed, individually and as administrator of the Estate of Amber Reed (Reed), Jason Clark (Clark), Lacey Fredericks (Fredericks), Harvey Kimble, personal representative for the Estates of Alvin Kimble and Gail Kimble (Kimble), Keara Carpenter (Carpenter), and Jackie Novak, administrator for the Estate of Charles Novak (Novak) (collectively plaintiffs), filed their second amended complaint, alleging causes of action for wrongful death, survival, and negligence against defendants in the circuit court of Cook

County.¹ The complaint established that plaintiffs Reed, Clark, Fredericks, and Novak reside in North Carolina. Plaintiffs Kimble and Carpenter reside in South Carolina. Defendants Ferrara Pan and Globe are Illinois corporations located in Cook County, Illinois. Defendants Velkov and Lazova also reside in Cook County, Illinois. Defendant CJH is an Indiana corporation.

¶ 5 Plaintiffs' complaint was filed due to injuries and deaths sustained when an 18 wheel tractor trailer, loaded with tons of Ferrara Pan candy and driven by Velkov, rear-ended a number of vehicles stopped waiting for a prior accident to be cleared from an expressway located in Henderson County, North Carolina.² Plaintiffs allege that Velkov was negligent and that he and Lazova owned Globe, a one-truck transportation business. Plaintiffs also named Ferrara Pan (who hired Globe and loaded its truck) in the lawsuit. CJH (which brokered the arrangement between Globe and shipper Ferrara Pan) was added as a defendant in the second amended complaint. As to Ferrara Pan and CJH, plaintiffs asserted agency and joint venture, and also alleged negligent retention and entrustment of the truck in violation of Illinois Department of Transportation regulations, which placed specific duties on them to check on the status of Velkov's commercial drivers license. Plaintiffs alleged that CJH and Ferrara Pan knew or should have known Velkov was using a fraudulent commercial drivers license.

¶ 6 On October 19, 2011, Lazova and Globe jointly filed a motion to dismiss the action

¹ The record on appeal does not contain the original complaint, but references in the briefs indicate the original complaint was filed in April 2011. The second amended complaint filed on August 10, 2012, dismissed Globe's insurer, Great West, and added CJH as a defendant.

² The complaint also alleges Velkov caused the death of Theresa Seaver. Seaver's representatives filed a cause of action in North Carolina.

pursuant to the interstate branch of the doctrine of *forum non conveniens*.³ See Ill. S. Ct. R. 187 (eff. Aug. 1, 1986). A similar motion was subsequently filed on October 21, 2011, by Ferrara Pan. Almost a year later, on October 11, 2012, after they were joined as defendants in the lawsuit, CJH filed a motion to join the codefendants' motions to dismiss. Defendants contended that North Carolina was the most convenient forum for this case, because plaintiffs did not reside in Illinois, and the witnesses, accident location, and physical evidence are in North Carolina. Moreover, Illinois would not have compulsory process over the out-of-state witnesses. Additionally, defendants stated generally that the cost of obtaining trial attendance in Illinois by any of the out-of-state witnesses would be "high." Defendants acknowledged the filing of a separate, but related cause of action in North Carolina on behalf of the Estate of Theresa Seaver which flowed from the same accident, and suggested if the matter were transferred to North Carolina they could join the Seaver lawsuit. Furthermore, Illinois jurors would be unable to view the scene of the accident. Defendants argued the courts in Illinois were more congested than the tribunals in North Carolina. Defendants referenced the current statistics from the Illinois Supreme Court which indicated 17,000 law division cases were currently pending in Cook County as opposed to 659 cases pending in Buncombe County, North Carolina, where the *Seaver* lawsuit was filed. Further, defendants contended Illinois residents had no interest in the substance of the controversy and should not be burdened by jury duty.

¶ 7 In response, plaintiffs argued that Illinois was an appropriate forum because the liability

³ At the time this motion was filed, defendant CJH was not a party to the lawsuit. When the second amended complaint was filed in August 2012, CJH was added as a defendant.

of Ferrara Pan, CJH, and Globe was the main issue in the case. Plaintiffs asserted that liability as to who was responsible for the accident was no longer an issue, as Velkov pled guilty to involuntary manslaughter, accepting liability. Plaintiffs stressed the deference the trial court should give a plaintiff's choice of forum. Plaintiffs also asserted that due to the many out-of-state witnesses, no single forum was more convenient. Further, Ferrara Pan, Globe, Lazova, and Velkov were all residents of Illinois. The shipping contracts at issue in the case were negotiated in Illinois. Payments made on those contracts were conducted via Illinois banks. Plaintiffs further stated generally that insurance policies were issued in Illinois. In addition, the tractor trailer driven by Velkov was licensed in Illinois. Ferrara Pan inspected Velkov's truck in Illinois. Velkov's medical documents are located in Illinois. Moreover, allegations contained in the complaint also implicate Illinois licensing laws and regulations.

¶ 8 Plaintiffs further argued defendants did not meet their burden because they were not able to demonstrate that Illinois is an inconvenient forum for defendants. Additionally, defendants did not provide any evidence that they would be unable to obtain documents located in North Carolina. Defendants also did not provide any affidavits from potential witnesses indicating it would be difficult to obtain their testimony. Plaintiffs maintained the cost of traveling between Illinois and North Carolina would be similar wherever the case would be tried, especially since all of the defendants would be required to travel to North Carolina if trial were conducted in that state. Lastly, plaintiffs argued Illinois residents would be interested in the case because it involved violations of Illinois laws.

¶ 9 On January 25, 2013, the circuit court denied defendants' motion to dismiss in a

memorandum order.⁴ The trial court recognized that deference is given to plaintiffs' choice of forum, therefore, defendants must show the relevant private and public interest factors strongly favor their choice of forum.

¶ 10 The circuit court concluded the private interest factors did not weigh strongly in favor of dismissal. The circuit court found that conducting litigation in Illinois was not inconvenient to defendants. The circuit court determined defendants' access to evidence did not weigh in favor of dismissal and noted that in the modern age of the internet and photocopying machines, documents are easily transported from one jurisdiction to another. Moreover, the circuit court pointed out the eyewitnesses were located in many different states including North Carolina, South Carolina, Kentucky, Indiana, Virginia, and Tennessee. The court determined when witnesses are scattered throughout various locations, no witness enjoys a predominant connection to the litigation. The circuit court did, however, conclude that viewing the accident scene weighed in favor of dismissal.

¶ 11 In evaluating the public interest factors, the circuit court found Illinois had a legitimate interest in the litigation involving defendants, as they are headquartered and operate in Cook County. Additionally, the court noted that plaintiffs' allegations that Velkov was a criminally incompetent driver who was not properly licensed further implicates violations of Illinois law, which connects Illinois to this litigation. The circuit court found the public interest factors did not strongly favor dismissal.

⁴ Plaintiffs note in their response brief that no oral arguments were heard on the motion and therefore no record of proceedings exists to include in the record.

¶ 12 After viewing the factors in their totality, the circuit court concluded that defendants failed to meet their burden and that trial in Illinois would better serve the convenience of the parties and the ends of justice.

¶ 13 We granted defendants' petition for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(2). Ill. S. Ct. R. 306(a)(2) (eff. Feb. 26, 2010).

¶ 14 ANALYSIS

¶ 15 On appeal, defendants contend that plaintiffs' action should be dismissed as *forum non conveniens* in favor of a North Carolina forum. The doctrine of *forum non conveniens* assumes that there is more than one forum with the power to hear the case. *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 169 (2005). "The doctrine allows a court to decline jurisdiction of a case, even though it may have proper jurisdiction over the subject matter and the parties, if it appears that another forum can better serve the convenience of the parties and the ends of justice." *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 12. *Forum non conveniens* applies on both an interstate and intrastate basis. Therefore, the doctrine may be applied where the choice is between forums in different states as well as in the same state. *Id.* at ¶ 13. The issue in an interstate *forum non conveniens* case is "whether the case is being litigated in the most appropriate state." *Id.*

¶ 16 Each case, however, is unique and must be considered on its own facts. *Id.* at ¶ 21. The determination of a *forum non conveniens* motion lies within the sound discretion of the circuit court. *Lagenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 442 (2006), quoting *Dawdy v. Union Pacific R.R. Company*, 207 Ill. 2d 167, 176 (2003). On review, the circuit court's

determination will be reversed only if it can be shown that the court abused its discretion in balancing the relevant factors. *Id.* An abuse of discretion will be found where no reasonable person would take the view adopted by the trial court. *Dawdy*, 207 Ill. 2d at 177.

¶ 17 In determining whether the doctrine of *forum non conveniens* applies, the circuit court conducts an unequal balancing test to determine whether the plaintiff's chosen forum prevails. *Taylor v. Lemans Corp.*, 2013 IL App (1st) 130033, ¶ 15. "The defendant bears the burden of showing that the relevant private and public interest factors 'strongly favor' defendant's choice of forum." *Id.* at ¶ 16 (quoting *Langenhorst*, 219 Ill. 2d at 444). The private interest factors include: (1) convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; (3) the availability of compulsory process to secure attendance of unwilling witnesses; (4) the cost to obtain attendance of willing witnesses; (5) the possibility of viewing the premises, if appropriate; and (6) all other practical considerations that make a trial easy, expeditious, and inexpensive. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Fennell*, 2012 IL 113812, ¶ 15. The public interest factors include: (1) the administrative difficulties caused when litigation is handled in congested venues; (2) the unfairness of imposing jury duty upon residents of a community with no connection to the litigation; (3) and the interests of having local controversies decided locally. *Fennell*, 2012 IL 113812, ¶ 16.

¶ 18 Deference is given to the plaintiff's choice of forum. *Id.* at ¶ 18. "Unless the factors weigh strongly in favor of transfer or dismissal, the plaintiff's choice of forum should rarely be disturbed. However, the plaintiff's choice is not entitled to the same weight or consideration in all cases." *Id.* (citing *Dawdy*, 207 Ill. 2d at 173). "When the plaintiff is foreign to the chosen

forum and when the action giving rise to the litigation did not occur in the chosen forum, the plaintiff's chosen forum is accorded less deference." *Id.* A plaintiff's "home forum" for the purpose of an interstate *forum non conveniens* motion is the plaintiff's home State. *Kwasniewski v. Schaid*, 153 Ill. 2d 505, 553 (1992). Defendant bears the burden of showing that the plaintiff's chosen forum is inconvenient to the defendant and another forum is more convenient to all parties. *First American Bank v. Guerine*, 198 Ill. 2d 511, 518 (2002).

¶ 19 *Analysis of Private Interest Factors*

¶ 20 Initially, we note the circuit court did not consider all of the private interest factors, specifically, the availability of compulsory process to secure the attendance of witnesses and the cost to obtain attendance of willing witnesses. As our supreme court reminds us, when considering a motion to dismiss based on *forum non conveniens*, a trial court must include all of the relevant private and public interest factors in their analysis. *Fennell*, 2012 IL 113812, ¶ 24. In *Guerine*, the court proclaimed:

"Since *Peile*, we have exercised our supervisory authority more than 30 times to transfer cases away from plaintiffs' chosen fora. (See appendix.) Obviously, one of the purposes of the *forum non conveniens* doctrine-sensible and effective judicial administration-is not being served by this protracted interlocutory litigation over plaintiffs' forum choices. The resources of this court are more profitably spent deciding fully developed controversies than micromanaging errant forum rulings with nonprecedential supervisory orders. We urge our trial courts to give more careful consideration to *forum non conveniens* motions and to leave a better record of their

analyses. In turn, this will allow our appellate court to make informed decisions on Rule 306(a)(2) petitions and to develop further a body of law to guide the trial courts."

Guerine, 198 Ill. 2d at 520-21.

The supreme court, however, did not hold that omitting factors from the analysis necessarily results in reversal. See *Pendergast v. Meade Electric Company*, 2013 IL App (1st) 121317, ¶ 24. Accordingly, we remind the parties and the trial court to include all the relevant factors in their arguments and memorandum orders. We now turn to consider the private interest factors.

¶ 21 Initially, we take into account the deference owed to the plaintiffs' chosen forum and the convenience of the parties. Since plaintiffs are not residents of Illinois and the accident did not occur in Illinois, the circuit court properly afforded their chosen forum some deference. See *Erwin ex. rel. Erwin v. Motorola, Inc.*, 408 Ill. App. 3d 261, 276 (2011).

¶ 22 The first factor we consider is the convenience of the parties; defendants must demonstrate that the plaintiffs' chosen forum is inconvenient to them and that another forum is more convenient to all parties. *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 888 (2008). They cannot, however, assert that plaintiffs' chosen forum is inconvenient for plaintiffs. *Id.* at 889 (The defendant "may not assert that a transfer would result in more convenience to [plaintiff] to satisfy this private interest factor."), citing *Langenhorst*, 219 Ill. 2d at 448. Here, all defendants live in or near Illinois. The plaintiffs all reside in either North Carolina or South Carolina. Defendants have not demonstrated that North Carolina is more convenient to all parties. The trial court determined, "it cannot be said that the chosen forum is inconvenient to the Defendants and another forum is more convenient to all parties." Having reviewed the

evidence before the circuit court, we find no abuse of discretion in this finding.

¶ 23 Regarding the relative access to sources of testimonial, documentary, and real evidence, all of the eyewitnesses to the accident are located out-of-state. Defendants failed to provide the circuit court with affidavits stating that Cook County would be inconvenient. See *Ammerman*, 379 Ill. App. 3d at 890. Documents pertaining to the plaintiffs' medical care as well as police reports are also located out-of-state. As the trial court correctly noted, in the modern age of technology, internet, copying, and faxing, documents located outside the forum are readily attainable and defendants have not met their burden to prove otherwise. See *Erwin*, 408 Ill. App. 3d at 281. Moreover, evidence also exists in Illinois, including but not limited to, Velkov's medical records, contracts between defendants, documents related to Velkov's commercial drivers license, banking records, and insurance policies.

¶ 24 In addition, the record demonstrates many of the potential eyewitnesses to the accident are located outside of both Illinois and North Carolina. Consequently, neither state is more convenient to the witnesses. See *Guerine*, 198 Ill. 2d at 526. Although defendants assert these witnesses are not subject to the subpoena power of Illinois courts, where the transfer to some other forum does not solve the compulsory attendance problem, the compulsory process factor is regarded as being neutral, and not strongly favoring transfer. See *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 743-44 (2005).

¶ 25 We next consider the cost to obtain the attendance of unwilling witnesses. Plaintiffs indicate the bulk of the litigation will focus on the liability of defendants and the agency relationships between them and not on the liability surrounding the accident. Because the

witnesses utilized by plaintiffs primarily reside in or near Illinois, plaintiffs surmise the cost of their travel would be inexpensive. Further, plaintiffs assert the cost for the out-of-state witnesses to testify in Illinois would be comparable to the costs associated with the Illinois and Indiana witnesses having to travel to North Carolina. Defendants do not present any evidence of the actual cost of having willing witnesses testify in Illinois. The record demonstrates, whether the lawsuit is litigated in either state, that plaintiffs and defendants will bear costs associated with travel, therefore, this factor is neutral.

¶ 26 We also consider the possibility of viewing the premises. The accident site is located in North Carolina. Plaintiffs concede Illinois jurors would not be able to view the accident site. Accordingly, we agree with the trial court that this factor weighs in defendants' favor. See *Taylor*, 2013 IL App (1st) 130033, ¶ 22.

¶ 27 Lastly, we take into consideration all other practical considerations that make a trial easy, expeditious, and inexpensive. See *Gulf Oil*, 330 U.S. at 508. Defendants assert if the forum were changed to North Carolina, the current litigation could be consolidated with the related *Seaver* case and it would decrease costs and be more judicially efficient. In support of the proposition that a forum can be moved to consolidate litigation, defendants cite *Cook v. General Electric Co.*, 146 Ill. 2d 548 (1992). However, the *Cook* case involved a cause of action against a governmental corporation which, under statute, must be brought " 'in the county in which its principal office is located or in the county in which the transaction or some part thereof occurred out of which the action arose.' " *Id.* at 553, quoting Ill. Rev. Stat. 1989, ch. 110, par. 2-103. Such is not the case here. Overall, defendants have not shown that the private interest factors strongly

favor a transfer to North Carolina.

¶ 28 *Analysis of Public Interest Factors*

¶ 29 As previously stated, the public interest factors to consider include: "the administrative difficulties caused when litigation is handled in congested venues; the unfairness of imposing jury duty upon residents of a community with no connection to the litigation; and the interests of having local controversies decided locally." *Fennell*, 2012 IL 113812, ¶ 16.

¶ 30 The trial court did not consider the congestion of Illinois courts compared to North Carolina courts. Defendants assert that Illinois courts are more congested than North Carolina courts. Plaintiffs contend defendants' assertion is based on the case loads in one county in North Carolina and the time to verdict for cases in the law division, and argue this basis is improper as it does not reflect docket times for cases of the same subject matter as the present case. However, this factor " 'by itself, is relatively insignificant.' " *Ammerman*, 379 Ill. App. 3d at 892, quoting *Dawdy*, 207 Ill. 2d at 181. Congestion in the Illinois court alone is not sufficient to justify transfer of venue when none of the other relevant factors weigh strongly in favor of transfer. *Griffith*, 136 Ill. 2d at 114.

¶ 31 The next factor we consider is the unfairness of imposing jury duty on residents of a community with no connection to the litigation. The trial court determined:

"Cook County has a legitimate interest in the litigation involving Ferrara Pan, Globe Carrier Company, and Gergana Lavoza. Ferrara Pan and Globe Carrier Company are headquartered and operate in Cook County, Illinois. Additionally, Defendant, Gergana Lavoza resides and works in Cook County.

Furthermore, Plaintiff alleges that Defendant Velkov Roumen [sic] was a criminally incompetent driver who was not properly licensed by the Department of Transportation. Therefore, the violation of Illinois law connects Cook County to this litigation."

We acknowledge merely conducting business or being headquartered in the forum does not affect the *forum non conveniens* issue. *Fennell*, 2012 IL 113812, ¶ 47; *Gridley*, 217 Ill. 2d at 172.

Accordingly, the fact that defendants conduct business in Illinois is not dispositive. Plaintiffs' complaint, however, alleges agency and joint venture causes of action as well as a cause of action for negligent retention and entrustment of the tractor trailer truck against defendants. Plaintiffs further allege that CJH and Ferrara Pan knew or should have known Velkov was using a fraudulent commercial drivers license. These are allegations in which Illinois residents have an interest and, therefore, this factor does not weigh strongly in defendant's favor.

¶ 32 The final public interest factor we consider is the interest of having local controversies decided locally. Residents of North Carolina have an interest in deciding a controversy involving an accident that occurred in North Carolina. As previously discussed, Illinois residents also have an interest in deciding a controversy which includes allegations of negligent retention and entrustment of a commercial vehicle driven in Illinois. The record discloses the tractor trailer was initially loaded and inspected by Ferrara Pan in Illinois. The tractor trailer was driven on Illinois roads in which Illinois residents have an interest. Additionally, three of the defendants are residents of Illinois and, thus, Illinois has an interest in deciding controversies involving its residents. *Ammerman*, 379 Ill. App. 3d at 892. Thus, defendants have failed to show that Illinois

has no connection to this litigation and, therefore, this factor, too, does not weigh strongly in favor of defendants.

¶ 33 Evaluating the total circumstances of this case, we conclude the trial court's determination was correct, the balance of private and public interest factors does not strongly favor North Carolina over Illinois. In this case, defendants have failed to meet their burden of showing that any of the defendants or witnesses would be inconvenienced by a trial in Illinois, that trial would be impractical in Illinois, or that it would be unfair to burden the citizens of Illinois with trial in this case. This is not a case of "exceptional circumstances" where the interests of justice require a trial in a more convenient forum. See *Langenhorst*, 219 Ill. 2d at 442. Nor is this a case where the trial court's determination was irrational or lacking any support in the record. Defendants have failed to show that no reasonable person would take the view adopted by the trial court. See *Dawdy*, 207 Ill. 2d at 177. We hold that the trial court did not abuse its discretion in denying an interstate *forum non conveniens* motion to transfer the case to North Carolina.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 36 Affirmed.